
Sub-letting and Assigning Commercial Leases

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Topics considered today

- Sublease or assignment?
- The tenant's options explained
- The landlord's statutory duties outlined
- Case studies
- Legislation
- Example clauses

Alienation

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What is alienation?



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Alienation - what is it?

- The tenant's ability to deal with the lease:
 - Assignment of the lease
 - Sub-letting
 - Mortgaging
 - Granting licences for others to occupy
 - Sharing possession

Assignment - whole/part

- Where the tenant transfers the whole or part of its leasehold interest to another party.
- Tenant's view ("the lease is a burden") vs landlord's view ("don't want an unsatisfactory tenant").
- Leases often prohibit assignments of part.
- If landlord's consent is required it is implied that consent must not be unreasonably withheld.
- Landlord can require payment of reasonable sum for legal costs and expenses.

Assignment - cont.

- Landlord's consent to assign usually given in formal licence to assign, either:
 - given by deed, or
 - consent is in writing and signed for landlord and expressly states the landlord waives the requirement for a deed

Assignment - in breach

- Still effective to transfer legal estate
- Landlord may claim against Tenant
- Damages - what is the loss?
- Forfeiture

Be careful of wording

- Covenant not to assign or underlet **any part** of the premises. This prohibits a dealing of the whole
- Covenant not to underlet or part with possession of the premises **will not** prevent a dealing of the **part**



AGA

- A Landlord may often require that a tenant guarantees the performance, by the assignee of the covenants from which the tenant has been released.
- As the legislation surrounding AGAs is complex it is usual to find that a lease will set out an agreed form of AGA.

AGA continued...

- It will be usual to find that an AGA:
 1. Relates to all tenant covenants
 2. Lasts for the whole period that the assignee is liable
 3. is otherwise in the form reasonably required by the landlord

AGA continued...

- The Code for Leasing Business Premises in England and Wales 2007 (Lease Code 2007) says that AGAs should only be required if on the date of the assignment, the assignee:
 1. Is of lower financial standing than the assignor
 2. Is resident or registered overseas

AGA continued... (again)

- *K/S Victoria Street v House of Fraser (Stores Management) Ltd [2010]*
- Tenant's guarantor said it would guarantee the assignee's liability
- This was found to be void
- So, need to find new guarantor

More AGA...

- *EMI Group Ltd v O&H Q1 Ltd [2016]*
- Concerned the validity of an assignment by a tenant to the tenant's guarantor
- This is also deemed void
- The lease remain vested in the tenant and guarantor remains bound.

Underletting (Sub-letting)



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Underletting - whole/part

- Leases usually permit underletting of the whole of the property with landlord's prior consent
- Landlord will be concerned about tenant's ability to underlet as he may come into direct relationship with undertenant if:
 - if headlease is surrendered
 - if headlease is forfeited and undertenant gets relief
 - on renewal of undertenant's lease under 1954 Act
 - if headlease is disclaimed due to tenant's insolvency

Underletting cont.

- It is uncommon for leases to allow underlettings of part as landlord likely to be concerned about:
 - Potential estate management problems
 - Sub-dividing the property which may make it unmarketable
- Often tenant will be prevented from underletting:
 - Together with other rights not included in the lease
 - At a fine, premium or reverse premium
 - Allowing any rent free period

Group companies

- Landlords may agree to the tenant sharing occupation in certain circumstances
- Sharing occupation clause may allow tenant to share with a company within the same group
- Landlords may be reluctant to allow sharing outside of group companies

Other alienation

- Leases may contain a ‘sweep-up’ clause prohibiting all dealings other than those expressly permitted
- ‘Possession’ vs ‘occupation’
- *Akici v LR Butlin*, 2 November 2005 (Court of Appeal)
- For clarity, alienation covenant should be drafted to prohibit the tenant from parting with or sharing possession or sharing occupation.

Consent and legislation

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Legislation

- The LTA 1998 imposes certain duties in relation to specific applications. It bites where both of the following exist:
- The lease includes a covenant by the T not to assign, underlet, charge or part with possession without the consent of the LL; and
- The covenant is subject to a qualification that the consent is not to be unreasonably withheld

Statutory duties

- If the LTA 1988 applies then the duties which apply are:
- A duty to give consent
- A duty to give written notice of the decision
- A duty to pass applications for consent to appropriate people

Consent

- The application - considerations for tenant
 - Check the terms of the lease
 - Format
 - Information to be provided
 - Pre-conditions
 - Special circumstances
 - Time period
 - Costs

Consent cont.

- Receipt of the application - considerations for the landlord
 - Has the statutory duty been triggered?
 - What is a reasonable time?
 - Do I have to give consent?

Has the duty been triggered?

- The duties arise when a written application is served by the tenant on the landlord
- If not served correctly then the landlord does not have a duty to respond within a reasonable time frame

Reasonable time?

- From when?
- For how long?
- What if the landlord changes their mind?

To consent or not to consent

- Breaches of repairing covenant
- Potential breach of user covenant
- Tenant owes monies to landlord under separate management agreement
- Proposed assignee is not a good covenant
- Tenant mix

Consent cont.

- Reasonableness - general guidance
 - Purpose of qualified covenant is to protect landlord's interests
 - Refusal must relate to landlord & tenant relationship
 - Burden on tenant to prove reasonableness
 - Landlord must act as a reasonable landlord would
 - Balance parties' interests
 - Each case to be decided on its facts

Consent cont.

- Valid grounds for refusal
 - Breaches of repairing covenant
 - Potential breach of user covenant
 - Tenant owes monies to landlord under separate management agreement
 - Proposed assignee is not a good covenant
 - Tenant mix

Consent cont.

- Remedies
- Tenant - if consent is unreasonably withheld:
 - Proceed without consent
 - Court application
 - Damages
- Landlord - if tenant has unlawfully dealt with premises:
 - Forfeiture
 - Damages
 - Injunction

Case examples

Examples of where consent has been reasonably withheld:

- Unsatisfactory references of the proposed assignee
- Assignee may compete with landlord's business
- Assignment would reduce landlord's reversion (but not if landlord has no intention of selling reversion)

Consent found to have been unreasonably withheld:

- Where refusal is an attempt by landlord to obtain advantage for himself
- Property with high rent on the market for 18 months; prejudice to tenant outweighed slight harm to landlord.

Example clause/application letter

- See handout

Case study

International Drilling Fluids Ltd -v- Louisville (Uxbridge) Ltd [1986] 1 All ER 321

- Lease contained provision not to be assigned without consent of landlord, not to be unreasonably withheld.
 - Tenant sought permission to assign premises to a company for the permitted use - office space.
 - Landlord refused consent on basis that the proposed use would cause diminution in value of landlord's reversionary interest.
 - Landlord's decision dismissed - although only bound to consider own relevant interests when deciding whether to consent, unreasonable for landlord not to consider detriment suffered by tenant if disproportionate to landlord's benefit.
 - Unreasonable to refuse consent where proposed user was within the type of use permitted and would fully secure payment of rent and if refusal would leave property vacant.
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Case study

Luminar Leisure Ltd -v- Apostole [2001] 3 EGLR 23

- Premises operated by landlord as nightclub before grant of lease to tenant, which was then listed as building of special architectural and historic interest
- Tenant sought landlords consent to change of use and underlet to a gym/health operator but was refused on grounds of loss of reversionary value.
- Held that landlord unreasonably withheld consent - his method of having his valuer first value the business as a nightclub and failing to research information on fitness club was improper to determine value of premises
- Although the tenant was in breach of the lease in failing to keep open the nightclub, the landlord failed to mitigate his loss by unreasonably withholding consent to change of use.

Assignment - relevant legislation

s.144 of the Law of Property Act 1925 (“LPA 1925”):

- Landlord can’t charge a fine as condition of giving consent unless there is an express provision to the contrary

s.19(1)(a) of the Law of Property Act 1927 (“LPA 1927”):

- Applies to all lease and converts qualified covenants against alienation in all leases into a fully-qualified covenant

s.19(1)(b) of LPA 1927:

- Allows tenant to ignore qualified covenant against alienation and proceed without LL’s consent, subject to conditions
- Not during last 7 years of term
- Tenant must give notice of dealing to landlord within 6 months.

Relevant legislation cont.

s.19(1A) LPA 1927:

- Allows parties to agree in advance:
 - When the landlord may withhold consent to assignment
 - Conditions to be complied with before landlord gives consentLandlord will not unreasonably refuse if he consents in these circumstances.

s.19(1C) LPA 1927:

- Conditions or circumstances left to landlord's discretion are invalid unless the lease:
 - requires discretion to be exercised reasonably, or
 - exercise of discretion can be reviewed by independent 3rd party.

REAL LIFE DRAMA



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Any questions?

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